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No. 5, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, COMPLAINANT,

v.

JOHN F. SHIPP ET AL.

MEMORANDUM UPON COMPLAINANT'S EVIDENCE OBJECTED TO BY DEFENDANTS.

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THE UNITED STATES OF AMERICA, complainant, *v.* JOHN F. SHIPP ET AL. } No. 5, Original.

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The principal objection made by defendants to evidence offered by complainant referred to newspaper articles published in the Chattanooga *Times* and Chattanooga *News*, morning and evening papers, respectively, of large circulation in the community. The earliest publication of any of these articles which were circulated before the lynching was on March 11. One of the principal points of inquiry in this proceeding has been the state of public mind at the time of and immediately preceding the lynching. Complainant contends that it was such and had so manifested itself as to give the sheriff and his deputies every reason to believe that a mob would attack the jail on the night of March 19. Defendant combatted this position and asserted that public feeling against Johnson had subsided and that there was no reason

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to apprehend an attack upon the jail. These articles therefore become important as showing the information which the public had relative to the habeas corpus proceedings in the Johnson case, as showing the manner in which Johnson's crime was again brought to public attention and publicly agitated, as showing the interest the public took in the proceedings, and as being in themselves an expression of the public anxiety as to the outcome of the proceedings and as to the safety of Johnson. One can not read them without feeling that they were a distinct warning to the sheriff and his subordinates that there was danger of mob violence.

One of the best ways of ascertaining the conditions in the community and the public feeling is by considering what was publicly done and said in the community immediately before the lynching. We do not think it essential to the admissibility of these articles to show that defendants had knowledge of them; but if so, there is a presumption that Captain Shipp and his subordinates knew about them, for aside from the fact that as members of the community they must have been informed as to what was contained in the local papers, they as officers of the law, guarding the life of a man who had been threatened with lynching, must have been alert to keep informed upon the state of public feeling, and especially whatever was published and circulated in that community. It was a part of their official duties. The articles here referred to are found on pages 27–33, 34–38, 39–43, 57–61, 312, marginal paging.

The first article referred to was published in the Chattanooga *Times* of March 11, and among other things told about Captain Shipp taking Johnson from Knoxville back to Chattanooga and placing him in the jail; about the great interest manifested in Johnson's trial in Knoxville; about the denial of petition for a writ of habeas corpus by Judge Clark and his order placing Johnson in the custody of Sheriff Shipp, to remain there for ten days pending application for an appeal to the United States Supreme Court, and stating that the execution of Johnson would not take place before March 23. This article also contains reference to what are termed "the dramatic incidents" of Johnson's trial.

The next article was published in the Chattanooga *Times* of March 18, and among other things refers to the increasing interest in Johnson as the day of his doom approaches and the increased number of people visiting the jail with a desire to see him.

The next publication is that contained in the *Times* of March 19, which states that Justice Harlan has allowed an appeal; that the time of Johnson's execution now remains uncertain, etc. Any objection which defendants might have to the admission of this article was waived by their bringing out the fact of its publication and the information it contained in the testimony of their own witness, Judge McReynolds (p. 1745).

The fact of the publication in the *News* of March 19 of information relative to the allowance of appeal and granting of stay by the United States Supreme

Court in the Johnson case was admitted by stipulation. In so far as that article was introduced for the purpose of proving the publication of that information, defendants therefore could not object to it. We think also that it is admissible for the purpose of showing the manner in which this news was made public and the information the public had as to the effect of the action of the Supreme Court in respect to delays in the execution of Johnson.

An editorial contained in the same edition of the *News* commenting upon the action of the Supreme Court was also introduced (p. 312). This is admissible not only as an expression of public opinion, but as a thing which in itself tends strongly to create a public opinion. The closing paragraph of that article was a sharp and public warning that the community was aggravated by the granting of the stay and consequent delay in the execution of Johnson and that mob violence was imminent.

Defendants objected to the introduction of a newspaper article reported by John T. Evans and published by the Birmingham *Age-Herald* May 28, 1906, containing statements made by Captain Shipp to the reporter relative to the lynching (pp. 167–174). As the reporter testified to certain statements contained in this article from his own recollection, the objection to the article in so far as it relates to those statements is of little importance. Statements here referred to are to the effect that Captain Shipp did not make any efforts to hurt any member of the mob; that the proceedings in the Supreme Court were a matter of

politics, and that the first information relative to an attack upon the jail which Sheriff Shipp got was from the Chattanooga *Times* over the telephone, and that the lynching was caused by delays of the law (pp. 162–166). The greater part of this interview was subsequently admitted without objection upon the part of defendants' counsel (pp. 319a–319b). The foundation for the introduction of the article at this subsequent time was quite different from that when it was first introduced. J. T. Barnes testified (pp. 317–318) that he submitted the article to Captain Shipp and that Captain Shipp thought it was accurate except in one particular. This clearly made the article admissible, and, as previously stated, no objection was made to its admission when offered in this way. So any objection which was made to the article as first introduced was waived. But that this article gives a correct report of what Captain Shipp said is testified to in positive terms by the reporter, Mr. Evans. It was therefore admissible under the doctrine of *Insurance Company* v. *Weides* (14 Wall., 375) and *Insurance Co.* v. *Weide* (9 Wall., 677).

Defendants objected to the article published in the Chattanooga *Times* of February 10, 1906, over the name of Mr. Thomas, one of the attorneys who defended Johnson (pp. 2166–2170). The fact of the publication of this article was testified to by Mr. Whittaker (p. 1678) and Mr. Boswell (p. 1705). This statement sets forth the reasons why Johnson's attorney deemed it inadvisable to appeal to the supreme court of the State of Tennessee from the judgment

convicting him. It was circulated in the community and Sheriff Shipp testifies that he read it. It was admissible, if for no other reason, because it contained a public warning to Sheriff Shipp and his deputies that in case any appeal should be taken in Johnson's case or any attempt made to have the case reviewed mob violence would surely follow.

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